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Supreme Court, U.S.
FILED
JUN 16 1997
CLERK

No. 96-1764

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARSHALL SPIEGEL AND CAROL SPIEGEL,
Petitioners,

v.

HOLLYWOOD TOWERS CONDOMINIUM ASSOCIATION AND RAYMOND J., BONITA, & M. DES ROSIERS,
Respondents.

On Petition For Writ of Certiorari To
The Illinois Supreme Court

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

This case raises a substantial question about the judicial process guaranteed by the Fourteenth Amendment to the federal Constitution, when a State exerts its authority to evict a family from their home. May a State court deny tenants an opportunity to present their objections to a condominium association's determination to evict them, merely because the association's bylaws state that such a determination is "final and binding"?

The present controversy arose when Petitioners Marshall and Carol Spiegel (the Spiegels) filed an amended complaint in the chancery court against Respondent Hollywood Towers Condominium Association (the Association)[1] seeking a declaration that the Association had failed to properly resolve their complaints regarding the noise created by adjoining neighbors and an injunction compelling the Association to enforce the Association bylaws against other tenants. The Association counterclaimed, requesting an order evicting the Spiegels. The chancery court dismissed the Spiegels' complaint and transferred the eviction action to municipal court. Before transferring the case, however, the chancery court held that the Chicago Landlord and Tenant's Ordinance, Chicago Code §§ 193.1 *et seq.*, did not apply because "[t]he [condominium] association bylaws are binding upon the parties." The Illinois Appellate Court (Appellate Court) affirmed, and the Illinois supreme court denied the Spiegels' petitions for leave to appeal. In effect, this judgment denied the Spiegels an opportunity to present substantial defenses to the Association's eviction action, merely because the Association bylaws state that any

[1] Respondents' "List of Interested Parties" states: "This Brief in Opposition is filed only on behalf of Hollywood Towers Condominium Association." Br. Opp. at i. This sentence carries serious consequences for the Des Rosiers' defense. Their choice not to join the Association's brief in opposition is deemed a waiver of any objection (other than one that casts doubt on jurisdiction) to this Court's consideration of the Spiegels' Question Presented. *See* SUP. CT. R. 15.2. For this reason, we refer to Respondents as "the Association" for the purposes of any non-jurisdictional issues.

determination by the Association's Board of Directors is "final and binding" on the residents.

The Question Presented asks this Court to decide whether the Illinois supreme court violates the tenants' right to due process under the Fourteenth Amendment. The Court's precedent establishes that a person who holds vested property rights, such as the possessory rights conferred by a condominium lease, cannot be deprived of such rights by a State without adequate notice and a hearing. The crux of the Spiegels' claim is that the State of Illinois deprived them of a meaningful hearing when the trial court held (and both the Appellate Court and the Illinois supreme court affirmed) that the Spiegels could not present defenses to the Association's eviction action, because the Association bylaws characterize decisions by the Association board as "final and binding." If left uncorrected, this judgment would mean, in effect, that State courts may exert their eviction authority without affording tenants a meaningful opportunity to present defenses to that action.

The Association and the Owners advance several reasons for denying review. None of them is ultimately persuasive.

I. THIS COURT HAS JURISDICTION TO REVIEW PETITIONERS' CASE.

Respondents urge the Court to deny the Spiegels' petition for lack of jurisdiction. First, they assert that the Spiegels "never cited the Fourteenth Amendment or the due process clause to the Illinois trial, Appellate, or Supreme Courts." Br. Opp. at 5-6. Second, they argue that the Spiegels' Question Presented "was never presented to the Illinois courts." Br. Opp. at 1. On both points Respondents are simply mistaken.

With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533 (1992), the Court exercises jurisdiction under 28 U.S.C. § 1257(a) only if a petitioner's federal claim was expressly addressed by the State court or properly presented for its review. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985). If the opinion of the State court does not expressly address the federal claim, the petitioner can still invoke the Court's jurisdiction if he successfully bears the burden of proving that the claim was nonetheless properly presented. *See Street v. New York*, 394 U.S. 576, 582 (1969). To meet that burden the petitioner must show that his federal claim was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Thus, whether the State court opinion contains citations to federal statutory or constitutional provisions is not the sole touchstone of jurisdiction under 28 U.S.C. § 1257(a). Jurisdiction lies with the Court so long as the petitioner can show that the federal claim was presented to the State court "with fair precision and in due time." *Id.* The Spiegels can make that showing in this case.

In their case before the Appellate Court the Spiegels raised three issues for review, one of which was "[w]hether plaintiffs were entitled to a hearing on their defenses to the eviction actions." Br. App. Ct. at 2. Later in the brief, the Spiegels connected their claim for a hearing with the procedural guarantees of the Fourteenth Amendment Due Process Clause. They wrote, "Indeed, this judicial hearing is necessary to satisfy a tenant's *due process rights*." *Id.* at 9 n.4 (emphasis added). In support of this proposition they cited two cases: *American Property Management Company v. Green Talaefard*, 552 N.E.2d 14 (Ill. App. Ct. 1990) and *Bowlby v. NDB Bank*, 640 N.E.2d 1095 (Ind. Ct. App. 1994). Each case plainly cites and discusses the Fourteenth Amendment Due Process Clause's guarantee of a fair hearing when a tenant is threatened with eviction. With this connection between the phrase "due process rights" and the

Fourteenth Amendment Due Process Clause established, the Spiegels can be said to have described their constitutional claim "with fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). They reiterated the identical claim in both petitions for leave to appeal to the Illinois supreme court. *See* Pet. L. App. I, at 6; Pet. L. App. II, at 11 n.3. Accordingly, Respondents' first contention, that the Court lacks jurisdiction because the Spiegels "never" cited the Fourteenth Amendment Due Process Clause, must be rejected.

Respondents' second objection to the Court's jurisdiction rests on a misunderstanding of the distinction between a federal *claim* and a federal *question*. Distinguished commentators have defined what the Court denominates a federal claim as a "reference to the particular clause of the federal Constitution or the particular treaty or statute relied upon, as well as the rights claimed thereunder." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 119 (7th ed. 1993). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988); *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983); *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)).

Once the Spiegels properly raised the *claim* that they were entitled to a hearing under the Fourteenth Amendment Due Process Clause, they were free to frame the Question Presented—and any argument in support of their claim—as they wished. *See Yee*, 503 U.S. at 535-36. It is therefore irrelevant whether the *arguments* articulated in this Court to support the Spiegels' due process claim are borrowed from earlier proceedings, or entirely novel.

In sum, Respondents' jurisdictional objections are ill-founded. This case presents a substantial federal question, which the Spiegels properly raised in the courts below.

II. PETITIONERS' EVICTION DOES NOT RENDER THEIR CLAIM MOOT.

The Association also contends that the Spiegels' petition for writ of *certiorari* should be denied because, as tenants, their claim is moot. They assert that the lower courts issued two orders evicting the Spiegels, one on behalf of the Association and the other on behalf of the Owners,[2] and that their residence at Hollywood Towers "has now been sold to unrelated third parties." Br. Opp. at 3 n.1. From this they draw the following conclusion:

> [E]ven if the new constitutional challenge to the Association's judgment is sustained . . . petitioners will not—indeed cannot because of an intervening sale of the unit—be put back in possession. Accordingly, consideration of this matter will have no effect on the parties.

Br. Opp. at 8.

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[2] Respondents point out that the Illinois Appellate Court affirmed the trial court judgment in favor of the Des Rosiers' action to evict the Spiegels. Br. Opp. at 3 n.1. Even if true, this fact does not advance the Association's argument against granting *certiorari*. If the lower courts denied the Spiegels a meaningful hearing before issuing an order evicting them from their home, as the Spiegels maintain, then the existence of a second eviction action is irrelevant to the question whether such a denial violated the Spiegels' due process rights. Moreover, the Des Rosiers cannot use their eviction as a weapon against the Spiegels' petition. By failing to join the brief in opposition they have waived all but jurisdictional objections to considering the question presented, *see supra* note 1. A second eviction order against the Spiegels, if useful to Respondents at all, goes to the issue of mootness, which falls in the category of justiciability, not jurisdiction.

A similar argument appeared in the the Association's case before the Illinois Appellate Court. It failed. The Association argued that the Spiegels' attempt to challenge the expansion of the Forcible Entry and Detainer Act was moot because the Spiegels had been evicted before the Appellate Court reached its decision. The court rejected this argument on the ground that "plaintiffs' amended complaint also sought damages in addition to declaratory relief." Pet. App. 6a-7a.

For the same reason this Court should reject the Association's argument that the eviction of the Spiegels from their residence at Hollywood Towers moots the Question Presented. The general rule is that, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party," *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895) (omitting intervening citations)), the appeal will be dismissed. However, a claim is not moot if a favorable judgment can afford Petitioners even partial relief. *See* 506 U.S. at 13. In the case at bar, damages may not afford the Spiegels total relief from the injuries they have suffered as a consequence of being wrongly evicted. But damages would offer the Spiegels partial relief, and that is all that is required to maintain a live controversy. The Association's attempt to cast the Spiegels' claim as moot therefore must be rejected.

III. PETITIONERS WERE DENIED DUE PROCESS OF LAW.

The Association contends on two grounds that the Spiegels' due process rights were not violated by the courts below. First, it argues that, by denying the Spiegels an opportunity to present defenses to the Association's eviction action, the Illinois courts merely prevented the Spiegels from relitigating an issue that was

res judicata. *See* Br. Opp. at 6-7. Second, the Association argues that the Spiegels were afforded an adequate hearing by the Association's Board of Directors. *See id.* at 7. Neither argument is sound.

A. *Res judicata*. The trial court held that the Association Board of Directors' determination to evict the Spiegels lay beyond the court's jurisdiction because the Association bylaws stated that such determinations were "final and binding." The Association argues that the Spiegels' attempts to obtain a judicial hearing, in which to present defenses to the eviction action, is actually a search for "a second hearing," Br. Opp. at 7, precluded by *res judicata*. This notion is grossly flawed.

The Court's precedents clearly explain the parameters of *res judicata* and the purposes it serves.

> Under res judicata, "a *final judgment* on the merits bars further claims by parties or their privies based on the same cause of action." . . . Res judicata thus encourages reliance on *judicial decisions*, bars vexatious litigation, and frees the courts to resolve other disputes.

Brown v. Felsen, 442 U.S. 127, 131 (1979) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added)).

The operative phrases "final judgment" and "judicial decision" are significant. Not just any decision counts as a judgment for purposes of a *res judicata analysis*. To be a thing *adjudicated*, a decision must be the product of a process closely analogous to a legal hearing before a court of law.

The hearing before the Association Board of Directors does not qualify. Whatever the virtues of a private hearing, even one with counsel and the opportunity to present evidence and cross-

examine witnesses, it does not satisfy the demands of the Due Process Clause when possession of a person's home is at stake. To see the fallacy of placing the Board's decision beyond judicial review, imagine the absurdity of allowing a state court to treat as "final and binding" a condominium association board's decision to exclude all blacks from residency, in violation of the 1964 Civil Rights Act. It is equally absurd to treat the Association's decision to evict the Spiegels as "final and binding."

B. *Due process*. The Association also claims that the "administrative hearings before the Association's Board of Directors," Br. Opp. at 7, satisfied the demands of due process. Again, the Association is mistaken. The process due under the Fourteenth Amendment must, in all events, satisfy the Court as being fair.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136 (1955).

Applying this standard to the instant case illustrates how the lower court proceedings lacked any semblance of constitutionality.[3] Due process requires not only a fair process,

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[3] Aside from our concerns with the due process accorded to the Spiegels below, the Association's eviction is tainted by questionable jurisdiction. Both in their petition for rehearing to the Appellate Court, Pet. Reh. at 5-9, and in their petition for leave to appeal to the Illinois supreme court, Pet. L. App. at 4-8, the Spiegels argued that the trial court lacked jurisdiction for two reasons.

but fair process "in a fair tribunal." *Id.* For that reason the Association's attempts to equate hearings before its Board of Directors with either an administrative hearing or with a court of law, *see* Br. Opp. at 7, fall flat. The Association's officers are not bound by oath to uphold the Constitution, as are federal and state officials. *See* U.S. CONST. art. VI. Hearings before the Board may have served certain administrative purposes for the Association, but they cannot be regarded as impartial; they make the Association a judge in its own cause, and permit it to make self-regarding decisions rather than public-regarding ones, in contrast to the duties that regularly fall on government officials. By any measure, therefore, the hearings afforded by the Association fall short of the requirements of due process.

First, the Forcible Entry and Detainer Act (FEDA), 735 ILL. COMP. STAT., 5/9-101 *et seq.* (West. 1992), as it appeared when the Association filed for an eviction, contained no provision authorizing a condominium association to evict tenants for a breach of covenant. And jurisdiction could not be implied, since FEDA is a statute in derogation of the common law, and Illinois courts have followed the rule of strictly construing jurisdiction thereunder. *See Bank of Belleville v. Stidmire*, 456 N.E.2d 175, 177 (Ill. App. Ct. 1983). Second, the Condominium Property Act contained no provision authorizing Illinois trial courts to entertain an action by a condominium association to evict a tenant for breach of covenant. This statutory lacuna was implicitly acknowledged by the Illinois legislature when it amended FEDA—after the Association brought the eviction action in this case—to provide jurisdiction in eviction cases brought by condominium associations. *See* 735 ILL. COMP. STAT., 5/9-102(a)(7) (West Supp. 1995).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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June 16, 1997